No. 06-766

In the

Supreme Court of the United States

NEW YORK STATE BOARD OF ELECTIONS, *et al.*,

Petitioners,

v.

MARGARITA LÓPEZ TORRES, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICI CURIAE* THE ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, THE PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND, THE HISPANIC NATIONAL BAR ASSOCIATION, THE PUERTO RICAN BAR ASSOCIATION, LATINO LAWYERS ASSOCIATION OF QUEENS COUNTY, THE CENTER FOR LAW AND SOCIAL JUSTICE, THE AMISTAD BLACK BAR ASSOCIATION OF LONG ISLAND, and THE ROCHESTER BLACK BAR ASSOCIATION IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

All eight organizations joining in this submission to urge the Court to affirm the Second Circuit's ruling have long worked on behalf of minority and female lawyers and litigants to achieve fairness in and through the courts of New York. Both by undertaking to promote minority lawyers to the bench and by affirmatively litigating civil rights cases over the years, all these organizations have an active, daily role in attempting to ensure that the judiciary of New York State is open, fair, and reflects the diversity of those it is meant to serve.

The Asian American Legal Defense and Education Fund ("AALDEF"), founded in 1974, is a national organization that protects and promotes the civil rights of Asian Americans. By combining litigation, advocacy, education, and organizing, AALDEF works with Asian American communities across the country to secure human rights for all.

The Puerto Rican Legal Defense and Education Fund ("PRLDEF") has championed an equitable society since its founding in 1972. Using the power of the law together with advocacy and education, PRLDEF protects opportunities for all Latinos to succeed in school and work, fulfill their dreams, and sustain their families and communities.

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[1] The parties, with the exception of Petitioner New York County Democratic Committee and Statutory Intervenor the Attorney General of New York, have filed letters with the Court consenting to all *amicus* briefs. Written consent from the remaining parties has been filed with the Court along with this brief. No counsel for a party has authored this brief in whole or in part, and no person or entity, other than amici or their counsel, has made a monetary contribution to the preparation or submission of this brief.

The Hispanic National Bar Association ("HNBA") is a non-profit, non-partisan, national legal association representing the interests of more than 38,000 U.S. Hispanic attorneys, judges, law professors, law graduates, law students, and legal professionals in the United States and Puerto Rico. Part of the HNBA mission is to ensure meaningful participation of Hispanics in the legal profession, including through a diverse judiciary. The HNBA's strong interest in the improvement of the administration of justice extends, in particular, to fairness and diversity in judicial selection processes.

The Puerto Rican Bar Association ("PRBA") is a professional organization composed of members of the bar and law students of Latino ancestry as well as other interested persons. The PRBA was founded to provide a forum for Latino and other lawyers who are interested in promoting the social, economic, professional, and educational advancement of Latino attorneys, the Latino Community and the administration of justice.

The Latino Lawyers Association of Queens County is an association composed of Latino and non-Latino lawyers, judges, law students and other interested professionals. Its mission is to promote the interests, advancement and opportunities for Latino lawyers, judges, law professors, and law students and to educate and inform the community, especially the Latino community, of their rights.

The Center for Law and Social Justice at Medgar Evers College, City University of New York, is a community-based education, research, and legal organization. It provides quality advocacy, training, and expert legal services in a personal manner to people of African descent and the disenfranchised.

The Amistad Black Bar Association of Long Island was organized in 1996 specifically to increase the number of African Americans on the bench in Long Island, and to provide networking opportunities for African American attorneys. The association is comprised of over 100 attorneys and judges.

The Rochester Black Bar Association ("RBBA"), an affiliate of the National Bar Association, serves to promote and enhance participation by lawyers in the greater Rochester community. The RBBA promotes ethical standards, legal education and equal opportunity for African American lawyers who are engaged in the practice of law in the greater Rochester area. The RBBA, which currently has over 60 members, consists not only of attorneys but also of law students, paralegals, and court personnel.

SUMMARY OF ARGUMENT

The convention system enjoined by the courts below does *not* serve the State's interest in promoting racial and ethnic diversity on the bench. The hard numbers confirm that, and the Second Circuit and district court correctly found as much. In fact, a close examination of the data lays bare what *amici curiae* — the Asian American Legal Defense and Education Fund, the Puerto Rican Legal Defense and Education Fund, the Hispanic National Bar Association, the Puerto Rican Bar Association, Latino Lawyers Association of Queens County, the Center for Law and Social Justice, the Amistad Black Bar Association of Long Island, and the Rochester Black Bar Association — have long known: the number of minority justices throughout New York State is dismally low and detrimental to the actual and perceived fairness of the judicial system with respect to the most disadvantaged citizens of New York.

Minorities seeking to become supreme court justices in New York are not served by a closed, back-door system built on cronyism and political favors. No diverse, fair system can be built by such means. As a blue-ribbon task force on diversity in the judiciary found fifteen years ago, opening the system is "*essential* to improving diversity on the bench. Now a candidate needs, or is perceived as needing, political entrees or even political party service in order to be a viable candidate for political office. Many well qualified minorities and women lawyers who are interested in becoming judges lack these particular credentials." HE-5776[2] (emphasis supplied).

Keeping minority lawyers from the bench only exacerbates the view of minority litigants and observers that the judicial system has little or nothing to do with them. After nearly a century, the system must be opened so that minorities can meaningfully participate. For that reason, *amici curiae* support the Second Circuit's ruling to affirm the district court in striking down the existing convention system, and believe this narrow approach to the remedy was appropriate under governing law.

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[2] "HE-__," "JA-__," and "Tr. __," refer to the Hearing Exhibits, Joint Appendix, and Transcript filed in the Second Circuit and in this Court. "Pet. App. __" refers to the opinions of the Second Circuit (Pet. App. 1a-92a) and district court (Pet. App. 93a-185a).

ARGUMENT

I. THE EXISTING CONVENTION SYSTEM FAILS TO SERVE THE STATE INTEREST OF DIVERSITY

Petitioners argue that the convention system promotes the State's interest in enhancing racial, ethnic and gender diversity on the bench. Br. of N.Y. County Dem. Comm. *et al.* ("County Br.") 46. After a close review of the undisputed data, the Second Circuit and the district court both rejected that argument. In particular, the Second Circuit concluded that petitioners had not satisfied their burden of demonstrating that the existing scheme reasonably served the State's interest in promoting diversity, and that, to the contrary, "[a] survey of the composition of the state's bench at the time this suit was filed suggests that over the course of 85 years the nominating process has, to put it mildly, failed to fully effectuate the state's goals as to geographic and racial diversity." Pet. App. 74a. The district court — which held the thirteen-day preliminary injunction hearing — likewise found the data did not reveal that diversity was advanced by the current system, Pet. App. 174a-75a, and further rejected as "flatly incorrect" the thesis of petitioners' expert that an alternative system with direct voter participation would curtail diversity. Pet. App. 176a.

The numbers of minority justices spread throughout the state's twelve judicial districts are not in dispute. *Every* judicial district in New York State has a substantial minority voting-age population, but many districts have *no minority justices at all*. HE-6769. As the Second Circuit found, at the time this litigation was filed, five of the districts, which together have 81 authorized supreme court justice seats, had *no* minority justices, including the Ninth Judicial District, whose voting-age population is more than one quarter

minorities.[3] Pet. App. 74a. Another three districts, which together have 90 seats, have a grand total of five minority justices, representing a far lower percentage of the overall bench than the comparable percentage of minorities in those districts' voting-age populations.[4] HE-6769.

While the defenders of the existing convention system repeatedly tout the numbers of minority justices in the districts which comprise New York City, County Br. n. 21, a proper examination of the data against the backdrop of the diversity of New York City itself reveals that even these numbers fail to support the convention system as the benevolent boon for minorities which petitioners try to cast it as.

As petitioners have been wont to point out, the percentage of minorities in the New York City judicial districts range from 31 to 44 percent based on 2001 numbers. *See* HE-7667; County Br. n. 21. But the comparative percentages of the voting-age population for these districts (the First, Second, Eleventh and Twelfth) belie the significance of even these numbers: minorities comprise from *50 to 82 percent* of these districts' overall voting-age populations. HE-7667. And the party bosses' relative benevolence to minorities in New York City only serves to accent the system's overall dismal record:

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[3] The Second Circuit noted that "[a]lthough it is not reflected in the record, . . . in 2005 the Ninth Judicial District elected a black Supreme Court Justice. This development does not alter our analysis: only one of the judicial district's 25 justices is a minority, *i.e.*, 4 percent, while minorities make up 27 percent of the district's voting age population." Pet. App. 74a, n. 11.

[4] The five districts that, as of 2001, had *no* minority justices are the Third, Fourth, Sixth, Seventh and Ninth, while the three districts with a combined total of five minority justices (or 5.5% of the total authorized seats) are the Fifth, Eighth, and Tenth districts, which respectively have the following percentages of overall minority voting-age population: 10.3%, 13.1% and 21.8%. HE-6769.

it is New York City's judicial districts which elect *92% — 57 out of 62 — of all the minority justices of the Supreme Court in New York State.* HE-7667, JA-1776 ¶ 99, HE-6769.

As the district court found, "the evidence the defendants have marshaled in support of this claim [that the convention system advances racial diversity] shows little more than that in New York City, where racial minorities exist in sufficient numbers that minority candidates do well in primary elections for Civil Court and other public offices, such candidates have also achieved success in obtaining Supreme Court nominations through the convention system. In other parts of the state, where minorities are present in much fewer numbers, minority representation among Supreme Court Justices is hardly remarkable." Pet. App. 174a-75a.

In fact, the available data suggests that within New York City, specific minorities would likely increase their numbers substantially if the district court and Second Circuit are affirmed and the existing convention system is enjoined.[5]

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[5] While the undersigned *amici* differ to some degree over which alternative system might best serve the goal of a diverse bench, all do agree that the current convention system fails to serve diversity. There is indeed support for the view that minorities and women can and do achieve positions through primaries, through commission-based appointment systems, or even through a convention system that actually allows for the meaningful participation of party members — which the current system categorically does not. For example, with respect to primaries as an alternative, as early as 1987, two Asian American candidates, Dorothy Chin Brandt and Peter Tom, defeated two white candidates in a county-wide Civil Court primary, *Primary Races: New York Tally*, N.Y. Times, Sept. 17, 1987, at B2. Rolando T. Acosta, a Dominican American, won a countywide primary for Civil Court in 1997. David Herszenhorn, *Race for City Hall: The Judiciary; 3 Lawyers Win Races to Lead the Democrats*, N.Y. Times, Sept. 13, 1997, at A27. Plaintiff Margarita Lopez-Torres, a Puerto Rican woman, won contested county-wide Civil Court primaries as recently as 2004, and prevailed against a white female candidate for re-election to a countywide Civil Court seat in 2002. *See* Pet. App. 15a. Hon. Diccia T. Pineda-Kirwan, a member of the Latino Lawyers Association of Queens County,

Although as of 2001 in the Bronx (the Twelfth Judicial District) 45.3% of the voting-age population was Hispanic, only 16.7% of the Supreme Court justices were Hispanic. HE-6766. Queens — the Eleventh Judicial District — had just a single Hispanic Supreme Court justice (2.6%) despite having a Hispanic voting-age population of 23.4%. *Id.* Moreover, that single justice (Hon. Jaime Rios) now sits in the Appellate Division — so there is not a single Hispanic justice sitting as a Supreme Court Justice in the Criminal or Civil Term, despite the rising Hispanic population of Queens. Hispanic voters are underrepresented in all four of New York City's judicial districts on the Supreme Court. *Id.*

In 2001, Asian Americans comprised 17.5% of the voting-age population in Queens, but just one justice out of 38 — or 2.6% — is an Asian American. HE-6767. And despite constituting 9.8% of the voting-age population in Manhattan, again only one justice, or 2.6% of the supreme court bench is Asian American. *Id.* In the Second Judicial District, Asian Americans constitute 7.4% of the voting-age population, but do not have a single Supreme Court justice on the bench.[6] *Id.*

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was elected to Civil Court in Queens County. Additionally, African American borough presidents have been elected in Manhattan on numerous occasions extending back as far as the 1970s. In the Bronx, Fernando Ferrer and Adolpho Carrion, both Latino, were elected to that countywide office, while in Queens, Councilman John Liu and Assemblyman Jimmy Meng both won primaries in 2001 and 2004. Errol Louis, *Strength in Numbers*, N.Y. Daily News, May 16, 2006.

[6] The studies and polls cited by *amicus* Asian American Bar Association of New York, AABANY Br. at 20-24, simply confirm the obvious: that racism against Asian Americans still exists in New York and across the country. In essence, AABANY argues that Asian American lawyers cannot compete effectively in judicial elections unless they first curry favor with political bosses at conventions to overcome low Asian American voter registration and turnout. AABANY's assertion is inaccurate and surely cannot be a justification for retaining the current convention system. In fact, because voter registration and turnout rates in New York's Asian American communities are steadily increasing, Asian

And, although African Americans have obtained representation in the First and Eleventh Judicial Districts beyond their proportions in those districts' voting-age population, they remained under-represented in the Second and Twelfth Judicial Districts. HE-6768.

Even the relative success in parts of New York City is called into doubt by certain data outside the City — such as the fact that as of 2001, there were *no* African American justices in the Ninth Judicial District even though African Americans are 10.3% of the voting-age population.[7] *Id.* The experience of *amicus curiae* Amistad Black Bar Association of Long Island is on point. All judges of color in Long Island — nine to be exact — are members of the association and all are African American; there are no other minorities represented on the bench in Long Island. Only one of the nine, Hon. Michele M. Woodard, sits in the Supreme Court. Prior to her election there was one other minority in the Supreme Court, the Hon. Marquette Floyd, who retired in 2002. Five of the nine judges of color sit in District Court, one in Family Court, one in County Court, and one in the Court of Claims. Moreover, only a single African American judge sits in Suffolk County — on the district court. Although the Amistad Black Bar Association has seen some new faces on

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Americans will have a greater voice in electing a diverse state judiciary if a fair and open political process is substituted for the current convention system. *See generally* Asian American Legal Defense and Education Fund, *The Asian American Vote in the 2006 Midterm Elections* (2007), http://www.aaldef.org/docs/AALDEF2006ExitPollReportMay2007.pdf; Asian American Legal Defense and Education Fund, *The Asian American Vote 2004: A Report on the Multilingual Exit Poll in the 2004 Presidential Election* (2005), http://www.aaldef.org/articles/2005-04-20_67_TheAsianAmeric.pdf.

[7] *See supra* n. 3.

the bench, the *status quo* remains in that there has not been any increase in the number of African American Supreme Court judges – there continues to be only one.

These more recent numbers only confirm that the findings made fifteen years ago, by a blue-ribbon Task Force on Diversity in the Judiciary appointed by Governor Cuomo, remain true today. In 1992, the task force found:

> We believe that another major cause of lack of diversity in the judiciary is the closed nature of the system now used in New York State to select judges.
>
> As we all know, our system is only nominally one of election. In practice, it is the political party leaders who have the decisive power to determine who will be nominated. Most often this nomination is tantamount to election.
>
> The Task Force believes that opening up this system is essential to improving diversity on the bench. Now a candidate needs, or is perceived as needing, political entrees or even political party service in order to be viable candidate for political office. Many well qualified minorities and women lawyers who are interested in becoming judges lack these particular credentials. They may be political independents, or members of a party that is not dominant in the area or, if party members, may not have been active in the organization in power. Rightly or wrongly, these lawyers perceive themselves as having no chance of becoming a judge under the current system for the "election" of judges. Our own experience is that their perception is well founded.

HE-5775 to 5776. A few years later, in 1996, the New York State Committee on Women in the Courts, appointed by the Chief Judge, similarly concluded that while there had been progress in increasing gender diversity on other courts in

New York State, there had been virtually no progress with respect to the Supreme Court. HE-6758. In their next report in 2002, the Committee pointed to statistics revealing that the Supreme Court bench had one of the lowest percentages of women sitting as judges — only 17% statewide.[8] HE-5755.

All of this data fully corroborates the direct experiences of *amici curiae* in dealing with the existing convention system. Over and over again, our members and constituents — minority attorneys and litigants alike — experience the system as being controlled by a powerful network that fails to overlap with their own communities and interests.

The experience of plaintiff Margarita Lopez Torres is exemplary. Unwilling to do the local party boss's bidding, she was shut out from a Supreme Court Justice position for years. As the Second Circuit noted: "Lopez Torres' experience was no anomalous political mugging." Pet. App. 29a. And as the district court noted: "Lopez Torres's seven-year effort to obtain her party's nomination for Supreme Court Justice is the selection process in a microcosm. The path to the office of Supreme Court Justice runs through the county leader of the major party that dominates in that part of New York State. Without his or her support, neither superior qualifications nor widespread support among the party's registered voters matters." Pet. App. 143a (footnote omitted).

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[8] There is support for the proposition that women can and do succeed through an alternate system of primaries. As early as 1977, a slate of female candidates, including Carol Bellamy, Marie Lambert and Ruth Messinger, all won contested primaries throughout New York City. N.Y. Times (Abstracts) 29, 1977 WLNR 112171 (Sept. 9, 1977) (reporting Lambert upset win); N.Y. Times (Abstracts) 21, 1977 WLNR 106221 (Sept. 21, 1977) (Bellamy); N.Y. Times (Abstracts) 29, 1977 WLNR 112177 (Sept. 9, 1977) (Messinger).

II. THE SECOND CIRCUIT SHOULD BE AFFIRMED

The existing convention system is detrimental to the members and constituents *amici curiae* serve, precisely because it is a system which shuts out minorities and requires the political boss's *imprimatur*. *See* Pet. App. 131a. Because the data — which is undisputed — supports our own experience of the system as one that is closed and fails to promote diversity in the judiciary, the Asian American Legal Defense and Education Fund, the Puerto Rican Legal Defense and Education Fund, the Hispanic National Bar Association, the Puerto Rican Bar Association, Latino Lawyers Association of Queens County, the Center for Law and Social Justice, the Amistad Black Bar Association of Long Island, and the Rochester Black Bar Association all support the affirmance of the court below.

Although certain *amici curiae* supporting petitioners have called for a reversal and remand to the district court solely for a hearing on remedy, there does not appear to be support for that in the law. The district court found the convention system inherently unconstitutional, precisely because it functions to shut voters out from the process. It then followed the principles long espoused by the Supreme Court, both by striking as little of the statute as possible under the circumstances, and refraining from "'rewrit[ing] state law to conform it to constitutional requirements.'" *Ayote v. Planned Parenthood of Northern New England*, 546 U.S. 320, 329 (2006) (quoting *Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 397 (1988)). Because it is not the role of the courts to redraft unconstitutional statutes, *amici curiae* believe the court below should be affirmed.

CONCLUSION

For the reasons stated above, the Court should affirm the court below.

Respectfully submitted,

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